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No. 87-1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

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RICHARD L. DUGGER, etc., et al.
Petitioners,

v.

ROBERT LAWSON, etc., et al.
Respondent

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# REPLY MEMORANDUM OF PETITIONERS

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A.

In our petition we suggested that this case presented issues similar to those in a case now pending before the court on petition for a writ of certiorari, Meese v. Abbott, case no. 87-1344, cert. granted 108 S.Ct. 1572 (1988). We asked the court to grant the writ but to stay consideration of

this case pending a decision in Abbott that may resolve all or part of the issues presented here. Not surprisingly, the respondents contend that Abbott is dissimilar.

The respondents offer two distinctions. The first, they say, is that Abbott deals with a challenge to the facial constitutionality of a Bureau of Prisons regulation governing the censorship of publications, while this case involves the question of when literature may be excluded under an administrative rule the parties agreed was constitutional. This distinction is without substance. The respondents challenged the unwritten policy of the Florida Department of Corrections of refusing admission of racist and inflammatory literature. There is no substantive difference between a written and an unwritten policy.

Moreover, the trial court in this case found the strict scrutiny test of Procunier v. Martinez, 416 U.S. 396 (1974), to be applicable when considering decisions to exclude individual publications under a facially valid rule. See Lawson v. Wainwright, 641 F.Supp. 312, 327 (S.D. Fla. 1986); A 93-A94.

The second distinction the respondents cite is that Abbott did not involve religious speech. It is clear, however, from the petitioners' petition in Abbott that at least some of the materials, like the ones in this case, were racist or preached ethnic superiority. See petitioners' petition, p. 6 n.5.

The fact that this case involves both religious and speech rights is not a principled basis for imposing some sort of heightened review above that ordinarily given speech cases. This Court has stated

in the past that the free exercise of religion (in nonprison contexts) may not be infringed without a compelling state interest, and that such an interest must ordinarily be of the highest order. Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981). But, it is not clear if this Court regards a compelling interest of the highest order to be a form of heightened scrutiny above that given non-religious speech cases.

In past cases involving religious speech, the Court has not distinguished on the basis of the speech's content -- that is, whether the case concerns political or religious matters. Rather, the court has treated religious speech cases similar to the way it has treated political speech cases. See Marsh v. State of Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed.2d 265

(1946); Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 89 L.Ed.2d 1292 (1942). Cf. Wooley v. Maynard, 430 U.S. 705, 715, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977), in which the Court did not distinguish between speech involving religion, politics or ideological causes and said that the right to speak on these subjects was part of a broad concept of individual freedom of mind.

Thus, there appears to be no basis for distinguishing this case, concerning religious speech, from Abbott, concerning other types of speech. Any decision in Abbott should affect the outcome of this case.

In final response to the respondents' point, we suggest the possibility that the publications at issue are not entitled to First Amendment protection. This Court has recognized that some types of speech either

are excluded from, or afforded limited, constitutional protection. The First Amendment does not protect:

1. obscene material, Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957);

2. child pornography, New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982);

3. fighting words, Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942);

4. incitement to imminent lawless activity, Brandenberg v. Ohio, 395U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969);

5. libel, defamation or fraud; see, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); Gertz v. Robert Welch,

Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed 919 (1952); Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed 155 (1939). See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 504 n.22, 104 S.Ct. 1949, 1961 n.22, 80 L.Ed.2d 502 (1984).

In particular, this court has held that racist, derogatory statements are not entitled to first amendment protection. Beauharnais v. Illinois, supra. Various parts of the publications at issue are at least, if not more, racially vituperative and derogatory that the statements held to constitute criminal libel in Beauharnais. See the appendix to Justice Douglas' dissent, which reproduced the pamphlet the petitioner in Beauharnais was convicted for distributing.

Therefore, we submit that there is substantial reason to conclude that the publications at issue are not subject to first amendment protection and that a decision in the Abbott case is likely to have a significant impact on the consideration of this case.

B.

The respondents argue that even if the reasonableness test of Turner v. Safley, 107 S.Ct. 2254 (1987), applies to this case, we failed to pass it because we offered no "objective evidence" to support our policy of excluding racist publications. Thus, the respondents see the policy as an exaggerated response. Along this line, the respondents contend that the "uncontradicted proof" showed that racist literature was not the source of prison violence.

This was not what was proven at trial. Rather, we were unable to offer evidence that a Hebrew Israelite inmate -- or any inmate for that matter -- read a piece of literature and because of that went out and committed a violent act. It does not logically follow that this kind of evidence supports the respondents' broad conclusion that they "established" the absolute lack of a causal link between racist literature and prison violence. The evidence only established, if anything, that no inmate has been immediately provoked to violence because of something he had read. Both the respondents and the trial court placed great stress upon the lack of any such direct link, and in fact, the trial court's decision hinged on it. Lawson v. Wainwright, 641 F.Supp. at 27; A93-A94:

> By their [the petitioners'] failure to present any evidence of violence, disruption, or actual threats to the security and order of any institution in which one or more inmates participated in Hebrew Israelite worship and/or possessed the sect's publications, the defendants fall short of satisfying their evidentiary burden in opposing the plaintiff's claims.

Ibid. See also Id., 641 F.Supp. at 320; A60.

This was the sort of "objective evidence" we were supposed to offer at the trial. We have no quarrel with the idea that the decisions of prison officials should be based on "objective evidence." The very notion of reasonableness embodied in this court's decision in Turner v. Safley, supra, would appear to require objective facts to support the reasonableness of a prison official's judgment. However, by holding that only a showing of past actual harm constituted

"objective evidence", the trial court went too far.

Even in the case relied on by the trial court for its objective evidence rule, Hernandez v. Estelle, 788 F.2d 1154 (5th Cir. 1986), no showing of a direct link between the publication at issue and prison violence was required to ban it. In Hernandez, the court of appeals permitted the banning of a newsletter because "of the established turmoil in the Texas Department of Corrections immediately preceding and during the time" that the publication was banned. Id. 788 F.2d at 1156. That turmoil included the takeover of a prison unit and a work stoppage at another unit. There were sit down strikes at a third unit and the inmates had occupied the prison yard. In addition, a significant civil rights case challenging prison conditions was set to go to trial soon. Id., 788 F.2d

1156. The newsletter excluded in the case contained three objectional letters that encouraged racial hatred. Prison officials "saw these articles as a potential spark which could ignite a 'powder keg situation.'" Ibid. There was, however, no showing of any connection with the newsletter and any act of violence.

Similar evidence of turmoil is present in the testimony in the case now before the court. Much of it came from the mouths of the respondents' own expert witnesses. Richard Swanson, for example, testified that he found racial tensions in Florida prisons during one study in which he took part. Mr. Swanson also testified that he also would have had questions about the Hebrew Israelite material. (Trial transcript pp. 158-159) He said he understood why prison officials might be reluctant over the material. (Trial

transcript p. 135) Allyn Sielaff, a respondents' witness, testified that the Hebrew Israelite literature was racist and that it wasn't a good idea to encourage racism in prison. (Trial transcript p. 57) Another respondents' witness, Leo Carroll, concurred that it wasn't a good idea to teach racism in prison, and he said that racial slurs or racial rage can cause prison violence. (Trial transcript pp. 355, 357, 360-361)

However, the trial court did not -- and the respondents do not now -- discuss this testimony, which came out on cross examination. Instead, the trial court accepted the respondents' view that a showing of a direct link between the admission of a piece of paper and an act of violence was required before a publication could be banned. And in reviewing the evidence, it appears that the trial court

sought that proof not in all the testimony, but only in the testimony of the defendants' witnesses. See Lawson v. Wainwright, 641 F.Supp. at 320, 322; A60, A68-A69.

The respondents also attempt to draw a link between the admission by court order 20 years ago of Black Muslim literature into various state prisons. Respondents' response p. 19. They cite testimony offered at trial which indicated that Black Muslim literature was as racist as that of the Hebrew Israelites but caused no problems. However there is no testimony whether the conditions of racism existing in prisons are the same today as they were when the Black Muslims were at their most active and vituperative.

Indeed, it appears that in recent years, white supremacist groups are more active in state prisons around the

nation. See McCabe v. Arave. 827 F.2d 634 (9th Cir. 1987); Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252 (8th Cir. 1987). It is not unreasonable to conclude that white racists might react with less than liberal tolerance if the type of racist literature at issue in this case circulated freely on a prison compound.

Thus, the respondents' argument is wrong that there was no objective evidence supporting the decision to ban the publications at issue and that therefore it was unreasonable to do so (violating Turner). The response of the petitioners was not exaggerated.

C.

The respondents further argue that the trial courts did not apply the strict scrutiny test of Procunier v. Martinez, supra, but instead balanced the

constitutional rights of inmates against the deference that should be accorded judgments of prison officials. (Respondents' response, pp 11-12).[1]/

This assertion is plainly wrong. The trial court discussed the applicability of the Martinez strict scrutiny test, as interpreted by the Eleventh Circuit Court of Appeals,[2]/ and then applied it. See Lawson v. Wainwright, 641 F.Supp. at 323-324, 329; A76-A80, A98-A100. To be specific, the court concluded that the prison practice of excluding an entire

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[1]/ This Court in Turner v. Jaffey, 107 S.Ct. 2254, 2257 (1987) referred to the Martinez test as strict scrutiny.

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[2]/ See Shabazz v. Barnauskas, 790 F.2d 1536 (11th Cir 1987), Bradbury v. Wainwright, 718 F.2d 1538 (11th Cir. 1983).

questionable publication was more restrictive than necessary and thus failed the Martinez test. Id., 641 F.Supp. at 329; A99-A101.

In addition, the trial court recognized the third part of the Martinez analysis. That part, which we addressed at length in our petition,[3/] provides that prison officials, in making decisions whether to admit or exclude a given document, cannot be held to prove with certainty that adverse consequences would follow from its admission. Id., 641 F.Supp. at 327; A93-A94. The trial court, however, misinterpreted this part to require prison officials to show that harm had already resulted directly from the admission of the

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3/ See our petition, pp.38-46.

respondents' literature before it could be banned. Id., 641 F.Supp. at 327-328, 329; A93-A97, A102-A103. The respondents' assertion thus is incorrect.

## CONCLUSION

Based on the arguments presented we respectfully as the Court to grant the Petition.

Respectfully submitted,

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